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STATE OF WISCONSIN

I N THE S U P R E M E C O U R T

Case No. 2012AP1582-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW MATASEK,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS WOLFGRAM, PRESIDING AND ON PETITION FOR REVIEW FROM THE DISTRICT TWO WISCONSIN COURT OF APPEALS ORDER AFFIRMING THE CIRCUIT COURT

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. THE CIRCUIT COURT HAS THE AUTHORITY UNDER WIS. STAT. § 973.015 TO EXERCISE ITS DISCRETION AND WITHHOLD ITS DECISION ON EXPUNGEMENT UNTIL THE DEFENDANT SUCCESSFULLY COMPLETES PROBATION

"[T]he cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act." Id at ¶ 38 (quoting *Student Ass'n v. Baum*, 74 Wis.2d 283, 294-95, 246 N.W.2d 622 (1976) (citation omitted)).

The purpose of statutory interpretation is the "determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Kalal*, 2004 WI 58 at ¶ 44, 271 Wis.2d 663, 681 N.W.2d 110

Wisconsin Statute § 973.015 allows expungement for many offenses and only requires that the circuit find: (1) society will not be harmed; (2) the defendant will benefit; (3) the defendant was under twenty-five years old. The legislature did not provide guidance on how the court is to determine whether society will be harmed or if the defendant will benefit. Clearly, the legislature intended that the circuit court to have wide discretion on what to consider when making those determinations.

The Respondent is arguing that the legislature "articulated a clear policy" of not granting the sentencing court discretion on whether to stay the execution of an expungement order until the successful completion of probation. (Res. Br. p. 5).

The Respondent's argument completely ignores the "full, proper and intended effect" of the statute; namely, that youthful offenders shielded from some of the harsh consequences of criminal convictions, *See State v. Anderson*, 160 Wis.2d 435, 466 N.W.2d 681, (Wis. Ct. App. 1991), and that only those defendants who will not harm society are expunged. The best way for a circuit court to honor the intended effect of the statute is to stay the execution of the expungement order until the successful completion of the probationary term.

Contrary to the Respondent's assertions, the Petitioner is not trying to rewrite the statute. The Petitioner is simply interpreting the statute the way the legislature intended.

Moreover, the Respondent's argument completely ignores the circuit court's considerable power of discretion in Wisconsin sentencing law. See State v. Killory, 73 Wis. 2d 400, 408, 243 N.W.2d 475 (1976), State v. Stuhr, 92 Wis.2d 46, 284 N.W.2d 259 (Ct. App. 1979); Cumminghan v. State, 76 Wis.2d 277, 251 N.W.2d 65 (1977). The Respondent's reading of the § 973.015 is contrary to that sentencing discretion. The Respondent wants this court to read the phrase "at the time of sentencing" by itself and simply ignore the remaining portions of the statute.

The Respondent also argues that the legislative history of § 973.015 supports its position that the sentencing court does not have discretion to order expungement after probation is completed. (Resp. Brief pp. 9-10). The Respondent admits that the legislature "made the decision to grant discretion" to the sentencing court to expunge certain convictions. *Id*.

The Petitioner agrees with the Respondent that the sentencing court was given this discretion. However, the Respondent misstates the Petitioner's argument asserting that Petitioner claims the circuit court has "unlimited discretion." (Res. Br. p. 10).

Certainly, the Petitioner does not argue that the circuit court has unlimited discretion. § 973.015 prescribes various findings the circuit court must make in order to expunge a conviction (i.e. the defendant must have been under 25 years of age at the time of the offense). There is some limit to the circuit court's discretion.

This limit, however, does not handcuff the circuit court from making its decision on expungement until after probation has ended. The purpose, context and placement of the statute indicate that the circuit court has this discretion. Petitioner is not asking this Court to rewrite § 973.015. On the contrary, the Petitioner is simply asking this Court to interpret § 973.015 to allow the circuit court the wide discretion the legislature intended.

II. MR. MATASEK WAS NEVER SENTENCED UNDER § 973.015. THUS, HIS CONVICTION CAN STILL BE EXPUNGED BECAUSE WAS NEVER "AT SENTENCING."

The Respondent concedes that probation is not a sentence. (Resp. Brief p. 7). However, the Respondent then argues that the context and placement of § 973.015 indicate that the term "sentencing" is a generic term. (Resp. Brief pp. 7-8). Respondent further argues that "sentence", in the

context of § 973.015, is a stand-in for all possible dispositions of the case. *Id.*

This argument is contrary to Wisconsin case law. *State v. Horn*, 226 Wis. 2d 637, 647, 594 N.W.2d 772 (1999), clearly states that probation is an alternative to sentencing, not a sentence itself. Clearly, probation and sentencing are closely related but they are not the same. *See Id.* The Respondent argues that they should be treated the same because § 973.015 is placed in Chapter 973 and Chapter 973 is labeled "Sentencing" (Resp. Brief pp. 7-8).

While Chapter 973 is titled "Sentencing", it is evident by the language used in Chapter 973 that the legislature separates a sentence from probation. For instance, § 973.16(1)-(3) deals with the circuit court giving notice to criminal defendants of firearm restrictions, voting restrictions, and working restrictions for child sex offenders. In § 973.16, subsections 1, 2 and 3 all begin with "Whenever a court imposes a sentence *or* places a defendant on probation . . . ." The use of the word "or" in § 973.16 (1)-(3) indicates that the legislature views probation and sentencing differently.

This is just one example of many in Chapter 973 where the legislature distinguished probation from sentencing.

The context and placement of § 973.015 support the Petitioner's assertion that Mr. Matasek was never sentenced. Consequently, Mr. Matasek can still request that the circuit court exercise its great discretionary power and expunge his conviction.

CONCLUSION

Mr. Matasek meets all the objective conditions for expungement. He was under 25 at the time of the offense and his charge was a felony with a maximum term of imprisonment for three and one half years. The Circuit Court erred when it ruled that it could not stay its decision on expungement until after Mr. Matasek successfully completed probation. For the foregoing reasons, the defendant-appellant-petitioner requests this case be remanded back to the trial court for a new sentencing hearing based solely on the expungement issue.

Dated this 27th day of January, 2014

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1048 words.

Dated this 27th day of January, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of January, 2014.

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